FILED
DEC 22 1998
OFFICE OF THE CLERK

No. 98-853

In The

Supreme Court of the United States

October Term, 1998

JERRY TAYLOR and MARY TAYLOR,

Petitioners,

v.

QUALITY HYUNDAI, INC., BANK ONE MILWAUKEE, N.A., and BANK ONE CHICAGO, N.A.,

Respondents.

and

DAVITA M. SMITH,

Petitioner,

v.

DESI AUTO SALES, INC., and GUARDIAN NATIONAL ACCEPTANCE CORP.

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION OF RESPONDENTS BANK ONE MILWAUKEE AND BANK ONE CHICAGO

ANDREW I. SUTTER
Of Counsel
Bank One Corporation
100 East Broad Street
Columbus, Ohio
43271-0158
(614) 248-6478

JOHN P. BUCKLEY
Counsel of Record
JOSEPH A. CARI, JR.
JULIETTE M. STEFFE
UNGARETTI & HARRIS
3500 Three First National Plaza
Chicago, Illinois 60602
(312) 977-4400

Attorneys for Respondents Bank One Milwaukee, N.A. and Bank One Chicago, N.A.

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

ISSUES PRESENTED

1. Whether the 1980 Amendment to the Truth In Lending Act (barring any civil action for violation of the Truth In Lending Act against an assignee of a creditor unless the violation for which such action or proceeding is brought is apparent on the face of the documents assigned) trumps the Federal Trade Commission's Holder Notice (1975) under which the assignee would have taken subject to any claims and defenses that the debtors could have asserted against the original sellers?

2. Whether the Seventh Circuit properly construed the standard for determining whether a violation is "apparent on the face" of the contract under 15 U.S.C. § 1641(a) of the Truth In Lending Act when it held that § 1641(a) does not require assignees to investigate the assignor's business practices?

CERTIFICATE OF INTEREST AND CORPORATE DISCLOSURE STATEMENT

The undersigned, as counsel of record for Respondents Bank One, Illinois, N.A., f/k/a Bank One Chicago, N.A., and Bank One, Wisconsin f/k/a Bank One, Milwaukee, N.A., ("Bank One") furnishes the following list in compliance with Supreme Court Rule 29.6:

1. Respondent Bank One, Milwaukee, N.A., merged with Bank One, Wisconsin on December 7, 1996, and is now named Bank One, Wisconsin.

2. Respondent Bank One, Chicago, N.A., merged with Bank One, Illinois, N.A., on February 15, 1997, and is now named Bank One, Illinois, N.A.

3. Bank One, Wisconsin's parent company is Bank One Corporation, f/k/a Banc One Corporation. Banc One merged with First Chicago NBD on October 2, 1998, and is now named Bank One Corporation.

4. Bank One, Illinois's parent company is Banc One Illinois Corporation.

5. Bank One Corporation is a publicly held company owning 10% or more of the stock in the aforementioned parties.

TABLE OF CONTENTS

Page

ISSUES PRESENTED i

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF AUTHORITIES v

STATEMENT OF CASE 1

REASONS WHY THE PETITION SHOULD BE DENIED 2

I. THERE IS NO CONFLICT OVER THE ISSUES PRESENTED IN THE PETITION 2

II. THE ISSUES OF ASSIGNEE LIABILITY UNDER TILA HAVE NOT RECEIVED SUFFICIENT ATTENTION IN THE LOWER COURTS TO WARRANT GRANTING A WRIT OF CERTIORARI 4

III. THE ISSUES OF ASSIGNEE LIABILITY UNDER TILA ARE NOT OF SUFFICIENT IMPORTANCE TO WARRANT GRANTING A WRIT OF CERTIORARI 4

A. The FTC, Whenever It Chooses, May Modify Its Holder Rule To Conform To The Language Of § 1641(a) 4

B. The Lower Court's Decision Does Not Deprive Petitioners Of A Remedy For Their Purported Injury 5

IV. THE SEVENTH CIRCUIT'S OPINION CORRECTLY RESOLVES THE ISSUES RAISED IN THE PETITION 5

TABLE OF CONTENTS – Continued

Page

A. Petitioners Frame The Issues In A Manner That Renders Congress Subservient To The Federal Trade Commission 6

B. Petitioners Attempt To Rewrite The Law To Graft A Subjective Test Onto The Objective "Apparent-On-The-Face" Standard Of § 1641(a) 8

C. The "Apparent-On-The-Face" Standard Of TILA § 1641(a) Is Unambiguous 9

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES

Alexander v. Continental Motor Werks, No. 95 C 5828, 1996 U.S. Dist. LEXIS 1849 (N.D. Ill. 1996) 3

Bambilla v. Evanston Nissan, Nos. 96 C 6818, 94 C 2748, 1996 U.S. Dist. LEXIS 7029 (N.D. Ill. 1996) 3

Brister v. All Star Chevrolet, Inc., 986 F. Supp. 1003 (E.D., La. 1997) 3

Cemail v. Viking Dodge, Inc., 982 F. Supp. 1296 (N.D. Ill. 1997) 3

Chevron, U.S.A. v. Natural Resources Defense Counsel, Inc., 467 U.S. 837, 104 S. Ct. 2778 (1984) 9

Ellis v. GMAC, No. 97-6963, 1998 U.S. App. LEXIS 28456 (11th Cir. 1998) 2, 4

Furge v. Evergreen Finance Co., No. 97 C 5176, 1998 U.S. Dist. LEXIS 16557 (N.D. Ill. 1998) 3

Green v. Lewis Motors, Inc., 994 F. Supp. 735 (M.D. La. 1997) 3

Kinzel v. Southview Chevrolet Company, 892 F. Supp. 1211 (D. Minn. 1995) 3

McPhan v. Geo. R. Gibson Chevrolet, No. 95 C 6077, 1996 U.S. Dist. LEXIS 17678 (N.D. Ill. 1996) 3

Mount v. LaSalle Bank Lakeview, No. 92 C 5645, 1998 U.S. Dist. LEXIS 10252 (N.D. Ill. 1998) 3

Ritter v. Durand Chevrolet, Inc., 932 F. Supp. 32 (D. Mass. 1996) 3

Smith v. Highland Park, 915 F. Supp. 281 (N.D. Ala. 1996) 3

TABLE OF AUTHORITIES – Continued

Page

Taylor v. Bob O'Connor Ford Inc., No. 97 C 0720, 1998 WL 177689 (N.D. Ill. April 13, 1998)..... 2

Taylor v. Quality Hyundai, Inc., 150 F.3d 689 (7th Cir. 1998) ..... *passim*

Turner v. II Diamond Motors, Inc., CA. 96-336-B-MI (M.D. La. July 14, 1997) 3

Van Vels v. Premier Athletic Center, No. 1:97-CV-665, 1998 U.S. Dist. LEXIS 10993 (WD MI 1998).....3, 9

Young v. Ford Motor Co., No. 97 C 4824, 1998 U.S. Dist. LEXIS 15376 (N.D. Ill. 1998)..... 3

STATUTES AND OTHER RULES

15 U.S.C. § 1601 *et. seq*..... *passim*

16 C.F.R. Section 433.2(a) (1987)..... *passim*

OTHER AUTHORITIES

H.R. Conf. Rep. No. 96-842 (1980), *reprinted in* U.S.C.C.A.N. 298 6

S. Rep. No. 96-73 (1979), *reprinted in* 1980 U.S.C.C.A.N. 280 7

S. Rep. No. 96-368 (1979), *reprinted in* 1980 U.S.C.C.A.N. 280 (1979).....6, 7

BRIEF IN OPPOSITION

Respondents, Bank One, Milwaukee, N.A., and Bank One, Chicago, N.A., (collectively "Bank One") respectfully request that this Court deny the Petition for Writ of Certiorari seeking review of the Seventh Circuit's opinion in this case. The Seventh Circuit's opinion is reported at 150 F.3d 689 (1998). Petitioner's Appendix 1.

STATEMENT OF THE CASE

Petitioners bought a car and an extended service warranty from Quality Hyundai; the Loan was then assigned to Bank One. Petitioners brought suit against the auto dealer and Bank One claiming violations of The Truth In Lending Act ("TILA"), 15 U.S.C. § 1601 *et seq.* Bank One moved to dismiss because TILA § 1641(a) exempts assignees like Bank One from TILA liability unless the violation is "apparent on the face" of the documents assigned. The District Court dismissed Bank One and a Seventh Circuit panel unanimously affirmed.

The Seventh Circuit held that TILA § 1641(a) exempts assignees from liability under TILA, notwithstanding the Federal Trade Commission ("FTC") Holder Notice set forth in 16 C.F.R. Section 433.2(a) (1987) ("FTC Holder Notice"). The Seventh Circuit ruled that the Holder Notice does not govern TILA-based claims against assignees. The Seventh Circuit found that the Holder Notice is part of the contract by force of law and must be read in light of other laws that modify its reach (§ 1641(a)). *Taylor,* 150 F.3d at 693 (Pet. App. 6-7). In addition, the Seventh Circuit held that the requirement of

§ 1641(a) that the violation not be "apparent on the face" of the assigned documents does not impose a duty of additional inquiry on assignees. Only a violation that a reasonable person could spot on the face of the disclosure statement or other assigned documents would make the assignee liable under TILA. Since no such violation existed, the Seventh Circuit affirmed the dismissal of Bank One from this case. *Taylor*, 150 F.3d at 694-95 (Pet. App. 8-9).

Petitioners now seek review in this Court.

REASONS WHY THE PETITION SHOULD BE DENIED

I. THERE IS NO CONFLICT OVER THE ISSUES PRESENTED IN THE PETITION

The Seventh Circuit Court of Appeals quite properly ruled that when a conflict may exist between a federal statute enacted by Congress and a federal regulation promulgated by the Federal Trade Commission, the statute rules. Therefore, the exemption of § 1641(a) controls over the FTC Holder Notice and assignees are not liable under TILA unless the violation is apparent on the face of the documents assigned. *Taylor*, 150 F.3d at 693, 695. Every federal court that has addressed this issue has reached that conclusion. *See, e.g., Ellis v. GMAC*, No. 97-6963, 1998 U.S. App. LEXIS 28456 (11th Cir. 1998); *Taylor v. Bob O'Connor Ford Inc.*, No. 97 C 0720, 1998 WL

177689 at *9-11 (N.D. Ill. April 13, 1998);[1] *Brister v. All Star Chevrolet, Inc.*, 986 F. Supp. 1003, 1009-10 (E.D. La. 1997); *Kinzel v. Southview Chevrolet Company*, 892 F. Supp. 1211, 1217 (D. Minn. 1995); *Ritter v. Durand Chevrolet, Inc.*, 932 F. Supp. 32 (D. Mass. 1996); *Turner v. II Diamond Motors, Inc.*, CA. No. 96-336-B-MI (M.D. La. July 14, 1997);[2] *Smith v. Highland Park*, 915 F. Supp. 281 (N.D. Ala. 1996); and *Van Vels v. Premier Athletic Center*, No. 1:97-CV-665, 1998 U.S. Dist. LEXIS 10993 (W.D. Mi. 1998). There is no conflict between the Circuit Courts of Appeals, between the Circuit Courts of Appeals and the District Courts, or between the District Courts. Certiorari is therefore not warranted.

---

[1] *Taylor v. Bob O'Connor* (Gottschall, J.) is just one of several different decisions in the Northern District of Illinois ruling in this manner. In addition to Judge Holderman's decision in the *Smith v. Guardian National Accepting Corp.*, case consolidated here, *see Alexander v. Continental Motor Werks*, No. 95 C 5828, 1996 U.S. Dist. LEXIS 1849 (N.D. Ill. 1996) (Kocoras, J.); *Bambilla v. Evanston Nissan*, Nos. 96 C 6818, 94 C 2748, 1996 U.S. Dist. LEXIS 7029 (N.D. Ill. 1996) (Leinenweber, J.); *McPhan v. Geo. R. Gibson Chevrolet*, No. 95 C 6077, 1996 U.S. Dist. LEXIS 17678 (N.D. Ill. 1996) (Nordberg, J.); *Furge v. Evergreen Finance Co.*, No. 97 C 5176, 1998 U.S. Dist. LEXIS 16557 (N.D. Ill. 1998) (Marovich, J.); *Young v. Ford Motor Co.*, No. 97 C 4824, 1998 U.S. Dist. LEXIS 15376 (N.D. Ill. 1998) (Manning, J.); *Mount v. Bank Lakeview*, No. 92 C 5645, 1998 U.S. Dist. LEXIS 10252 (N.D. Ill. 1998) (Norgle, J.); and *Cemail v. Viking Dodge, Inc.*, 982 F. Supp. 1296 (N.D. Ill. 1997) (Moran, J.).

[2] *See also Green v. Lewis Motors, Inc.*, 994 F. Supp. 735 (M.D. La. 1997).

II. THE ISSUES OF ASSIGNEE LIABILITY UNDER TILA HAVE NOT RECEIVED SUFFICIENT ATTENTION IN THE LOWER COURTS TO WARRANT GRANTING A WRIT OF CERTIORARI

The issues raised in the Supreme Court were issues of first impression before any Federal Court of Appeals. *Taylor*, 150 F.3d at 693 (Pet. App. 5). Only two Courts of Appeals – the Seventh Circuit in *Taylor* and, most recently the Eleventh Circuit in *Ellis*, 1998 U.S. App. LEXIS 28456 (11th Cir. 1998) – have ruled on these issues.[3] The paucity of published opinions, and the consistency of those opinions, both indicate this case does not warrant a writ of certiorari.

III. THE ISSUES OF ASSIGNEE LIABILITY UNDER TILA ARE NOT OF SUFFICIENT IMPORTANCE TO WARRANT GRANTING A WRIT OF CERTIORARI

A. The FTC, Whenever It Chooses, May Modify Its Holder Rule To Conform To The Language Of § 1641(a)

Petitioners urge the United States Supreme Court to resolve the perceived conflict between the federal statute and the federal regulation. But the purported problem posed was not created by the Seventh Circuit's opinion, which correctly states that the statute trumps the regulation; it is created by the FTC's failure to act and make their regulation consistent with the congressional mandate as set forth in § 1641(a). Any inconsistency between

---

[3] *See* citations above.

the FTC's Holder Rule and § 1641(a) is a result of the FTC's inaction in the wake of the amendment to that statute. The FTC at any time can modify the language of its rule to conform with the current state of the law, if it determines such action is necessary. Neither this Court, nor any other court, is obligated to make this executive determination for the FTC.

B. The Lower Court's Decision Does Not Deprive Petitioners Of A Remedy For Their Purported Injury

Although Petitioners contend that "millions" of people will be affected by the Seventh Circuit's decision, they fail to mention that the lower court's ruling does not deprive them of a remedy under TILA. Although it is true that, consistent with the language of § 1641(a), Petitioners may not hold the Bank as assignee responsible for their alleged injury, Petitioners still may pursue the seller of their car for relief under TILA. In light of the absence of any conflict between circuits, this continuing right to sue the seller obviates the need for a writ of certiorari.

IV. THE SEVENTH CIRCUIT'S OPINION CORRECTLY RESOLVES THE ISSUES RAISED IN THE PETITION

The Seventh Circuit correctly framed the issues presented and correctly decided the questions of law. Because the Seventh Circuit got it right, a writ of certiorari is not warranted.

A. Petitioners Frame The Issues In A Manner That Renders Congress Subservient To The Federal Trade Commission

What the petitioners are seeking in this case is a rule from this Court that states that the proverbial tail (the Federal Trade Commission and its regulation) wags the dog (Congress and its legislation). While the petitioners cast this question in terms of their belief that Congress would not or could not have enacted such an amendment if it intended to contradict the provisions of millions of consumer credit contracts, such a position leads inevitably to a ruling that neither the Courts nor Congress can contradict FTC regulations – a position no Federal Court has ever accepted.

Petitioners' beliefs as to Congress' intent in enacting the 1980 Amendment to the assignee provisions of the TILA (15 U.S.C. § 1641(a)) are unsupported by any legislative history. Their beliefs also are contradicted by the fact that Congress was made aware of the effect of the Amendments (exempting assignees from TILA liability).

First, Petitioners cite no legislative history in support of their belief that "Congress would not or could not have enacted such an amendment," (Pet. at 8), if it intended the result held by the Seventh Circuit. The legislative history, however, demonstrates that Congress did specifically intend to narrow the scope of assignee liability. *See* H.R. Conf. Rep. No. 96-842 at 80-81 (1980), *reprinted in* U.S.C.C.A.N. 298, 310-11; S. Rep. No. 96-368 at 32-33 (1979), *reprinted in* 1980 U.S.C.C.A.N. 280, 296. The Amendment, which specifically removed provisions

allowing assignee liability for "knowledge", further supports the Congressional intent as found by the Seventh Circuit.

Second, Petitioners' argument that Congress "could not or would not" is refuted by the fact that one speaker, Mr. Hobbs, in arguing against the amendment, specifically forecast the result found by the Seventh Circuit:

> This section [proposed § 1641(a)] removes assignee liability for violations known to the assignee which are not apparent on the face of the transferred documents . . . If the assignee knows that the amount financed contains overcharges, the assignee is not liable and has no incentive to guard against the overcharge as long as the overcharge is disguised so as not to be apparent on the face if the instruments . . .

Hearing before the Committee on Banking, Housing and Urban Affairs, United States Senate, 96th Congress, February 2, 1979, at 42.

Petitioners also speculate that perhaps Congress and the FTC thought there was no conflict between § 1641(a) and the FTC Holder Rule – there is no support for this position, either. The fact is Congress enacted an unambiguous exclusion for assignees; it was up to the regulators to conform their regulations to the statute, if they felt it was important to do so. Perhaps the regulators were concerned, as was Congress, that TILA forms already were providing too much information, and needed simplification rather than further complication. *See, e.g.*, S. Rep. No. 96-368 at 16 (1979), *reprinted in* 1980 U.S.C.C.A.N. 252; S. Rep. No. 96-73 at 2 (1979), *reprinted*

in 1980 U.S.C.C.A.N. 280. Of course, this too is speculation. What is not speculation is the following: (1) the FTC can resolve the conflict at any time by modifying the regulation to conform to the law as set forth in the statute, and (2) the statute enacted by Congress clearly and unambiguously exempts Bank One from liability in this case. This is exactly how the Seventh Circuit ruled.

Section 1641(a) is unambiguous. It focuses attention on the disclosure documents required by TILA. It does not require an assignee to investigate the business practices of the assignee or consider generalizations about the assignee's industry before it accepts the assignment. Section 1641(a) obligates an assignee to scrutinize the relevant documents for obvious deviations from the technical requirements of TILA. If there are none on the face of the documents, the assignee's duties are discharged and it may accept the assignment without fear of TILA liability. Petitioners can offer nothing, either in terms of the language of the law or the legislative history, to refute this analysis.

B. Petitioners Attempt To Rewrite The Law To Graft A Subjective Test Onto The Objective "Apparent-On-The-Face" Standard Of § 1641(a)

Petitioners incorrectly claim that the Seventh Circuit "fabricated" the standard for determining whether a violation is apparent on the face of the contract. Pet. 11. The Seventh Circuit properly read the statutory language, and applied analogous banking law standards to explain that "apparent on its face" means just that – the violation must be recognizable from a review of the disclosure

statement and other documents assigned and nothing else. Petitioners seek to graft a subjective component onto a test Congress intended to be objective. The court below, recognized, however, that to do so would rewrite the relevant legislation. This Court should reject Petitioners' efforts to substitute their judgment for that of Congress.

C. The "Apparent-On-The-Face" Standard Of TILA § 1641(a) Is Unambiguous

Petitioners' second issue boils down to simple statutory construction – Petitioners do not like the construction given to the statue by every federal court that has addressed the issue. Petitioners' disagreement, however, does not justify this Court's intervention:

> where a federal statute's language is unequivocal, the courts are simply to apply it rather than consult legislative history or agency interpretations

Van Vels, 1998 U.S. Dist. LEXIS 10993, at *14 (applying § 1641(a)) citing *Chevron, U.S.A. v. Natural Resources Defense Counsel, Inc.*, 467 U.S. 837, 842, 104 S. Ct. 2778 (1984). The Seventh Circuit did just that; this Court should let the decision of the lower court stand.

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit should be denied.

Respectfully submitted,

ANDREW I. SUTTER
Of Counsel
Bank One Corporation
100 East Broad Street
Columbus, Ohio
43271-0158
(614) 248-6478

JOHN P. BUCKLEY
Counsel of Record
JOSEPH A. CARI, JR.
JULIETTE M. STEFFE
UNGARETTI & HARRIS
3500 Three First National Plaza
Chicago, Illinois 60602
(312) 977-4400

Attorneys for Respondents Bank One Milwaukee, N.A. and Bank One Chicago, N.A.